Supreme Court, U.S.
FILED
JUN 15 2005
OFFICE OF THE CLERK

Nos. 04-1528 and 04-1530

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, U.S. PIRG, COMMON CAUSE, THE LEAGUE OF WOMEN VOTERS, DEMOS, PUBLIC CAMPAIGN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND RECLAIMDEMOCRACY.ORG IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

MARTHA TIERNEY
KELLY, HAGLUND, GARNSEY & KAHN L.L.C.
1441 Eighteenth Street,
Suite 300
Denver, Colorado 80202-1255
(303) 296-9412
Counsel for Amicus Curiae Common Cause

DOUGLAS R.M. NAZARIAN*
PATRICIA A. BRANNAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for other Amici Curiae
* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	4
REASONS FOR GRANTING THE WRIT	7
I. *Buckley* Does Not Preclude State Regulation of Campaign Expenditures.	7
II. State Regulation of Elections, and the Power of States to Govern Themselves, Compel A Different (and More Deferential) Balancing of the Interests Bearing on Expenditure Restrictions	8
III. The Nature of State Government Further Tempers Candidates' First Amendment Concerns Here.	13
IV. State Governments Need Even Greater Flexibility Than the Decision Below Allows to Solve the Problems Associated with Financing of State Elections	16
CONCLUSION	19

TABLE OF AUTHORITIES

	Page
CASES:	
Bates v. Jones, 131 F.3d 843 (9th Cir. 1997), *cert. denied*, 523 U.S. 1021 (1998)	9
Bernal v. Fainter, 467 U.S. 216 (1984)	9
Boyd v. Nebraska ex rel. Thayer, 143 U.S. 135 (1892)	9
Buckley v. Valeo, 424 U.S. 1 (1976)	*passim*
California Democratic Party v. Jones, 530 U.S. 567 (2000)	13
Duncan v. McCall, 139 U.S. 449 (1891)	9
First National Bank v. Bellotti, 435 U.S. 765 (1978)	12
Gregory v. Ashcroft, 501 U.S. 452 (1991)	9, 10
Grutter v. Bollinger, 539 U.S. 306 (2003)	5
Homans v. Albuquerque, 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 625 (2004)	6, 19
Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir. 1997), *cert. denied*, 522 U.S. 860 (1997)	15
Landell v. Sorrell, 382 F.3d 91 (2d Cir. 2004)	*passim*
McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003)	5, 8, 18
New State Ice Co. v. Liebman, 285 U.S. 262 (1932)	17
Nixon v. Shrink Missouri Gov't PAC, 528 U.S. 377 (2000)	*passim*
Oregon v. Mitchell, 400 U.S. 112 (1970)	9
Sugarman v. Dougall, 413 U.S. 634 (1973)	9, 11
CONSTITUTION:	
U.S. Const. amend. I	*passim*

TABLE OF AUTHORITIES—Continued

	Page
U.S. Const. amend. X	9
U.S. Const. art. IV, § 4	9, 11
STATUTES:	
1961 Vt. Laws 178	18
1971 Vt. Laws 259	18
1975 Vt. Laws (Adj. Sess.) 188	18
Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263	2, 3
Former Vt. Stat. Ann. tit. 17, § 2841 (1991) (repealed 1977)	18
RULE:	
S. Ct. Rule 37.6	1
OTHER AUTHORITIES:	
Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 222 (1998)	10
Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 Nw. U. L. Rev. 1055 (1999)	12
Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815 (1994)	10
Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1 (1988)	10
Frederick Schwarz, *From the Ground Up: Local Lessons From National Reform*, 27 Fordham Urb. L.J. 5 (1999)	18
Grimaldi & Edsall, *Super Rich Step Into Political Vacuum*, Wash. Post. Oct. 17, 2004, at A01	12, 18
Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New*	

TABLE OF AUTHORITIES—Continued

Page

Approach, 60 Wash. & Lee L. Rev. 767 (2003) 11

Nancy Northrup, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 Colum. L. Rev. 1677 (1987) 15

Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int'l. & Comp. L. 793 (2001) 15

Stephen Breyer, *Our Democratic Constitution*, Madison Lecture, 77 N.Y.U. L. Rev. 245 (May 2002) 17

The Federalist, No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961) 13, 16

Thomas Jefferson, *Drafts of the Kentucky Resolution of 1798*, in *The Works of Thomas Jefferson in Twelve Volumes* 485 (Paul Leicester Ford ed., G.P. Putnam's Sons 1904) 10

IN THE

Supreme Court of the United States

NEIL RANDALL, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,

Petitioners,

v.

WILLIAM H. SORRELL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR AMICI CURIAE THERESTOFUS.ORG, U.S. PIRG, COMMON CAUSE, THE LEAGUE OF WOMEN VOTERS, DEMOS, PUBLIC CAMPAIGN, CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON, AND RECLAIMDEMOCRACY.ORG IN SUPPORT OF THE RESPONDENTS-CONDITIONAL CROSS PETITIONERS AND THE RESPONDENT-INTERVENORS-CONDITIONAL CROSS PETITIONERS

STATEMENT OF INTEREST OF AMICI CURIAE

TheRestofUs.org is a nonprofit, nonpartisan organization whose mission is to reduce the influence of money on the

political process.[1] TheRestofUs.org works to inform and educate mainstream Americans, including the citizens of Vermont, about the role of large donors in campaigns and the tools available to citizens and governments to create a more level playing field. The organization has an interest in engaging citizens in the reform process, and the current perception that all spending limits are *per se* unconstitutional presents a significant barrier to the organization's work. TheRestofUs.org hopes the Court will take this opportunity to clarify the constitutionality of limits on campaign spending.

The National Association of State PIRGs (U.S. PIRG) represents state Public Interest Research Groups (PIRGs) at the federal level, including in the federal courts. In addition to sharing the interests of Vermont PIRG, other state PIRGs have an interest in enacting spending limits in their states. U.S. PIRG believes that a clarification by the Court of the circumstances in which expenditure limits are constitutional would assist the State PIRGs in advocating for comprehensive campaign finance reform.

Common Cause is a nonprofit, nonpartisan citizens organization. With approximately 250,000 members and supporters nationwide and active members and volunteers in every state, including Vermont, Common Cause's mission is to ensure open, accountable and effective government at the federal, state, and local level. Common Cause has a longstanding concern with problems in the nation's campaign finance system, including publicly advocating for the spending limit provisions of the Federal Election Campaign

---

[1] Letters of consent from all parties have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members or their counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263, and participating in the defense of FECA before the Supreme Court.

The League of Women Voters of the United States is a nonpartisan, community-based organization that encourages informed and active participation of citizens in government and seeks to influence public policy through education and advocacy. The League is organized in approximately a thousand communities and in every state, and numbers 150,000 members and supporters nationwide. The League was organized in 1919 as an outgrowth of the 72-year struggle to win voting rights for women in the United States. One of the League's primary goals is to promote an open governmental system that is representative, accountable, and responsive, that protects individual liberties established by the Constitution, and that assures opportunities for citizen participation in government decision making. To further this goal, the League has been a leader in seeking campaign finance reform at the state, local, and federal levels for more than two decades.

Demos is a nonprofit organization whose purpose is to help build a society in which America can achieve its highest ideals. Demos believes that this goal requires a democracy that is robust and inclusive, with high levels of electoral participation and civic engagement, and an economy where prosperity and opportunity are broadly shared and disparity is reduced. Demos believes that campaign spending limits, like those adopted by Vermont, help foster these goals by reducing the appearance of impropriety in political campaigns, increasing electoral competition, and allowing more of the electorate's voice to be heard.

Public Campaign is a nonprofit, nonpartisan organization dedicated to campaign reform that aims to reduce the role of big special-interest money in American politics. Public Campaign works with a range of organizations, including

some in Vermont, whose members are not fairly represented under the current campaign finance system in many states. Public Campaign believes that through state and national campaign reforms, like Vermont's Act 64, more citizens will seek elective office and become interested in local political affairs.

Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit, nonpartisan organization that, through litigation, focuses Americans, including the citizens of Vermont, on unethical conduct on the part of government officials. CREW's aim is to encourage government officials to act in the public interest. CREW believes that campaign-spending limits, like those approved by Vermont, are an effective way to accomplish this goal.

ReclaimDemocracy.org is a nonprofit organization with a national membership that includes Vermont residents. The organization works to build a genuinely representative democracy based on the principle that one's influence should result from the quality of one's ideas and the energy put into promoting them, independent of one's financial status. If wealth is a determining factor in the ability of either voters or candidates to make their voices heard in electoral races, ReclaimDemocracy.org believes that the Constitution's promise of "equal protection of the laws" has been broken. ReclaimDemocracy.org asks the Court to affirm the State of Vermont's right to protect the equal protection guarantee of the Fourteenth Amendment through reasonable limits on campaign spending.

SUMMARY OF ARGUMENT

This case presents an issue of exceptional national importance: whether interests beyond those addressed in *Buckley v. Valeo*, 424 U.S. 1 (1976), can justify state-enacted campaign expenditure limits governing candidates for state office. In an effort to address on a state level problems striking at the heart of democratic government, the Vermont

legislature enacted Act 64 in 1997 to limit (1) political-party donations to candidates, (2) donations from out-of-state contributors, and (3) candidate expenditures. After a series of appeals ending in the Second Circuit's denial of a rehearing *en banc*, the Second Circuit upheld the possible constitutionality of expenditure limits and recognized that *Buckley* did not impose a sweeping "fatal in fact"[2] strict scrutiny to all forms of expenditure limits.

As the Court has recognized since *Buckley*, unfettered campaign donations to and expenditures for political campaigns can create an appearance of impropriety and a perception that elected officials respond only to the special interests from which the money flows, thereby diminishing other citizens' confidence in government and discouraging those citizens from participating. *See McConnell v. Federal Election Comm'n*, 540 U.S. 93, 147-48 (2003); *Buckley*, 424 U.S. at 26-27, 46-47; *see also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390 (2000) ("Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance"). Campaign finance laws enacted in the wake of *Buckley* have not stemmed the tide of huge donations and expenditures that has overwhelmed modern political campaigns. *See McConnell*, 540 U.S. at 144-52. But although corruption concerns affect state government as well as federal government, state governments consider, and indeed are motivated by, other interests as well when shaping their electoral processes.

This Court has not, in the time since *Buckley*, specifically considered how and to what extent concerns other than corruption or the appearance of corruption balance the well-recognized First Amendment considerations implicated by

---

[2] The Court has acknowledged that strict scrutiny should not be "'strict in theory, but fatal in fact.'" *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (citation omitted).

campaign finance restrictions in state elections. Vermont's experiment in campaign finance reform represents a state solution to state problems, even if the same problems exist at the federal level as well. *Buckley*'s standard of strict scrutiny review for expenditure limits recognized that campaign expenditure limits could be justified by interests beyond corruption. Given the importance of these other interests to the integrity of state elections, federalism concerns warrant a different and more flexible balancing of these interests when the limitations apply solely to state elections.

Amici respectfully request that the Court grant the petitions as to question one and the conditional cross-petition, particularly since this case presents the only certain opportunity for the Court to consider and resolve these critically important issues. Vermont is currently the only state with mandatory expenditure limits. The evolving lower court applications of *Buckley*, including the Tenth Circuit's recent view that *Buckley* bans all expenditure limits,[3] have made state legislatures reluctant to consider including expenditure limits in new reform legislation even when they believe they would be helpful in reducing corruption and meeting other state interests.[4] *Amici* ask this Court to speak to the question of the constitutional scope of state discretion

---

[3] *Homans v. Albuquerque*, 366 F.3d 900 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 625 (2004).

[4] For two reasons, the trend of state legislatures and localities is to reject new campaign spending legislation that imposes mandatory expenditure limits. First, many states believe that mandatory expenditure limits are *per se* unconstitutional under *Buckley*, and more recently, *Homans*. Second, states are reluctant to enact mandatory expenditure limits because doing so opens them up to litigation similar to that facing the State of Vermont in the instant case. Until this Court clarifies the legal standards, efforts by states to enact expenditure limits as part of broader reform are likely to be very difficult to pass and, if passed, to lead to protracted litigation.

in this area, so the states have some guidance to inform their consideration of expenditure limits, not just a knee-jerk fear that they can never be defended under a strict scrutiny standard.

REASONS FOR GRANTING THE WRIT

I. *BUCKLEY* DOES NOT PRECLUDE STATE REGULATION OF CAMPAIGN EXPENDITURES.

The Second Circuit appropriately applied *Buckley v. Valeo*, 424 U.S. 1 (1976), to hold that limitations on campaign expenditures are not precluded *in toto*. *Buckley* expressly left open the possibility that expenditure limits, when sufficiently tailored, can pass constitutional muster. This case demonstrates that possibility, and gives the Court the opportunity squarely and cleanly to confirm the Second Circuit's ruling that important state interests beyond avoiding corruption balance against competing First Amendment interests, and to calibrate an appropriate constitutional test that shows due deference for federalism concerns.

In *Buckley*, this Court examined the Federal Election Campaign Act ("FECA"), reforms Congress passed to prevent corruption and its appearance and maintain the integrity of the electoral process. *Buckley*, 424 U.S. at 26-27. Applying strict scrutiny, the Court determined that the federal government had not demonstrated a sufficiently important interest to justify FECA's expenditure limits. *See id.* at 55-58. On the record before it, the Court held that "[n]o governmental interest *that has been suggested* is sufficient to justify...[the] campaign finance expenditure limitations." *Id.* at 55 (emphasis added). The Court recognized that a sufficiently strong interest in campaign expenditure limits could outweigh relevant First Amendment concerns. *See id.*; *see also Landell v. Sorrell*, 382 F.3d 91, 107-10 (2d Cir. 2004).

The Court has never considered the constitutionality of a purely *state* regulation of *state* candidate expenditures. *Buckley* related solely to a federal regulation of federal candidates and did not consider whether campaign expenditure limits for state or local elections were constitutional. And the analysis of Vermont's expenditure limits should take into account that it is a state regulation of state elections, a distinction from *Buckley* that changes the constitutional calculus in at least two ways. First, the state's authority to decide how state representatives are selected represents a significant interest in its own right. Second, the smaller scale, structure, and process of state government warrant a greater deference to the interests above and beyond corruption, interests that justify campaign expenditure limitations and temper countervailing First Amendment concerns.

II. STATE REGULATION OF ELECTIONS, AND THE POWER OF STATES TO GOVERN THEMSELVES, COMPEL A DIFFERENT (AND MORE DEFERENTIAL) BALANCING OF THE INTERESTS BEARING ON EXPENDITURE RESTRICTIONS.

The undeniable fact that expenditure limits implicate the First Amendment does not end the inquiry. First Amendment concerns must be balanced against competing constitutional concerns, *see McConnell*, 540 U.S. at 136-37 (considering competing interests such as the integrity of the electoral process), including those First Amendment interests preserved by campaign spending limits. In the specific case of the Vermont expenditure limits, a number of competing interests should be considered and balanced along with anti-corruption interests, among them (1) the local electorate's interest in governing its own elections and (2) Vermont's interest in protecting the integrity of its government.

Vermont's first obvious and fundamental interest lies in the undeniable right of its citizens to determine their own form of government and regulate their own elections. "No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution . . . the nature of their own machinery for filling local public offices." *Oregon v. Mitchell*, 400 U.S. 112, 125 (1970).[5] The right of citizens to determine how their state officials are to be elected appears in the text of the Constitution, *see, e.g.*, U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government."); U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people."), and has been affirmed repeatedly by this Court. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991) ("the authority of the people of the States to determine the qualifications of their most important government officials . . . lies at 'the heart of representative government'" and "is a power reserved to them" by the Tenth Amendment and the Guarantee Clause) (quoting *Bernal v. Fainter*, 467 U.S. 216, 221 (1984)); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (a state has a "constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders").[6]

---

[5] *See also Boyd v. Nebraska ex rel. Thayer*, 143 U.S. 135, 161 (1892) ("Each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen."); *Duncan v. McCall*, 139 U.S. 449, 461 (1891) ("the distinguishing feature" of a republican form of government "is the right of the people to choose their own officers for governmental administration, and pass their own laws").

[6] *See also Bates v. Jones*, 131 F.3d 843, 859 (9th Cir. 1997) (Rymer, J., concurring) ("to define how the [people of California]

Vermont should have the right to decide how to elect its state representatives, and that interest merits significant weight in any analysis of state campaign finance regulations.[7] In a related context, the Court "has never held that the [Fourteenth] Amendment may be applied in complete disregard for a State's constitutional powers. Rather, the Court has recognized that the States' power to define the qualifications of their officeholders has force even as against the proscription of the Fourteenth Amendment." *Gregory*, 501 U.S. at 468. In other contexts, the Court has calibrated the level of scrutiny to accord greater deference to local decision making in matters falling deeply within the prerogatives of state officials. So, for example, the Court deferred to a state's requirement of citizenship as a qualification for certain offices because "our scrutiny will not be so demanding where we deal with matters resting firmly

---

want to be represented is a right secured to the citizens of each state"), *cert. denied*, 523 U.S. 1021 (1998); Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. Colo. L. Rev. 815, 816 (1994) ("Most scholars would agree that a republican government is, at the very least, one in which the people control their rulers."); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 41 (1988) ("The guarantee clause . . . grants states control over their internal governmental machinery.").

[7] *See* Thomas Jefferson, *Drafts of the Kentucky Resolution of 1798*, in *The Works of Thomas Jefferson in Twelve Volumes* 458 463-464 (Paul Leicester Ford ed., G.P. Putnam's Sons 1904) (1798). Thus it is for the States or the people "to retain to themselves the right of judging how far the licentiousness of speech and the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use should be tolerated, rather than the use be destroyed." *Id.; see also* Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 222 (1998) (suggesting that the First Amendment should be treated differently when it is applied to the states under the doctrine of incorporation).

within a State's constitutional prerogatives." *Sugarman*, 413 U.S. at 648; *see also Gregory*, 501 U.S. at 462-463 (scrutiny is "less exacting" of state laws determining the qualifications of state officials). Vermont's right to govern and its interest in governing its own elections similarly are local interests of independent constitutional significance.

A second and equally important interest supporting expenditure limits is Vermont's interest in preserving the intergrity of its government. This interest lies in the stated rationales for Vermont's campaign expenditure limits: preventing actual or apparent corruption, promoting electoral competition, reducing officeholders' time devoted to fundraising, and bolstering public involvement and confidence in the electoral process.[8] All of these rationales are directed at the underlying goal of ensuring effective representative democracy,[9] a goal that the United States, including the federal judiciary, has a constitutional obligation to help state government achieve. *See* U.S. Const. art. IV, § 4; *Nixon*, 528 U.S. at 401 (Breyer, J., concurring); *see generally* Mark C. Alexander, *Campaign Finance Reform: Central Meaning and a New Approach*, 60 Wash. & Lee L. Rev. 767 (2003).

---

[8] *Landell*, 382 F.3d at 115. Apart from the competing constitutional interest of strengthening representative government, these rationales also represent valid compelling government interests justifying the restrictions imposed by Vermont's expenditure limits under the strict scrutiny analysis set forth by this Court in *Buckley* for federal expenditure limits. *Id.* at 115-25 (finding that preventing actual and apparent corruption and protecting the time of candidates can be compelling interests).

[9] As the Second Circuit made clear, the state's interest in preserving the integrity of the electoral process is an underlying basis for preventing actual and apparent corruption and protecting candidate time. *Landell*, 382 F.3d at 124 n.18.

To foster effective representative democracy, a state government must have the authority to enact campaign finance laws that support open debate and encourage political participation, as that state judges appropriate to its circumstances. But most states' current system of unlimited expenditures has not protected the First Amendment's guarantee of a fair and open democratic process.[10] Today's unlimited-expenditure campaigns stifle the voices of the majority of the electorate because the bulk of campaign spending goes toward the purchase of costly broadcast media campaign speech.[11] The majority of campaign speech, therefore, is controlled by a small number of candidates capable of spending unlimited sums of money. And as the broadcast speech drowns out other forms of expression, the ordinary electorate struggles for any effective means of raising its own issues and influencing the debate and discussion that leads to informed electoral choices. Moreover, modern spending levels discourage challengers from participating in the electoral process; and the resulting elimination of competition smothers meaningful discussion of political issues. *Landell*, 382 F.3d at 128.

Vermont's interest in protecting and strengthening its own representative government by limiting expenditures outweighs *competing* First Amendment concerns. "[P]reserving the integrity of the electoral process . . . is [an] interest[] of the highest importance." *See First National Bank v. Bellotti*, 435 U.S. 765, 788-789 (1978). Vermont's

---

[10] *See, e.g.*, Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 Nw. U. L. Rev. 1055, 1059 (1999).

[11] *Cf. Landell*, 382 F.3d at 130 (stating that, with expenditure limits in place, candidates have the opportunity to engage in low-cost campaigning, like town barbeques and door-to-door campaigning); *see, e.g.*, James V. Grimaldi & Thomas B. Edsall, *Super Rich Step Into Political Vacuum: McCain-Feingold Paved Way for 527s*, Wash. Post, Oct. 17, 2004, at A01.

expenditure limitations promote the general constitutional objective of open and active representational democracy by allowing a broader segment of the electorate to run for office, by reducing the impression that campaigns are bought and sold by wealthy contributors, by liberating officials and candidates from the constant need to neglect substantive matters for fundraising responsibilities, and by ensuring that public discourse remains uninhibited, robust, and open to the entire electorate.[12] For these reasons, Vermont's experiment with reasonable expenditure limits will lead to greater trust in state elections and promote greater competition and public participation in state elections. "Encouraging citizens to vote is a legitimate, indeed essential, state objective; for the constitutional order must be preserved by a strong, participatory democratic process," *California Democratic Party v. Jones*, 530 U.S. 567, 587 (2000) (Kennedy, J., concurring), and thus, the state electorate's responsibility for operating its own government, especially when combined with its interests in preserving the health of representative government, outweighs infringements on free speech that result from reasonable limits on local candidates' campaign expenditures.

III. THE NATURE OF STATE GOVERNMENT FURTHER TEMPERS CANDIDATES' FIRST AMENDMENT CONCERNS HERE.

The structure and purpose of state government vary significantly from those of the federal government. "The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes." The Federalist, No. 46, at 294 (James Madison) (Clinton Rossiter ed., 1961). State government meets the unique needs of the state through

---

[12] *See Landell*, 382 F.3d at 115-24; *see also Nixon*, 528 U.S. at 401 (Breyer, J., concurring); *id.* at 390-392; *id.* at 409 (Kennedy, J., dissenting).

regulating and monitoring planning and growth initiatives, transportation services, public education, and the daily concerns of constituents. These tasks require state government officials to be more directly involved in the day-to-day minutiae of their communities than representatives to the federal government might be. State officials focus their understanding of state needs differently and interact differently with individuals and local businesses than do representatives with broader national constituencies.

By design, state government officials are more acutely aware than their federal counterparts of the day-to-day needs of state constituents. In theory, state officials should be more accessible and devote more time to constituent needs than their federal counterparts. The Vermont General Assembly found that, prior to Act 64, candidates for state office were spending an inordinate amount of time raising campaign funds in order to avoid being outspent by their opponents. The Second Circuit upheld the District Court's finding that "'the Vermont public perceives, legitimately, that candidates frequently spend an excessive amount of time fundraising and not enough time interacting with voters.'" *See Landell*, 382 F.3d at 119-24. The need for unlimited campaign dollars forces elected officials to devote attention to identifying and responding to an ever-increasing number of contributors, and Vermont ought to have the ability to counter that disturbing trend.

State officials' intimate relationship with constituents only heightens the potential for and fallout from state corruption or the appearance of state corruption. State government officials frequently are responsible for contracts and other forms of purchases from vendors of public services who are often major contributors to the official's campaign. In smaller geographic areas, where state officials are more likely to be connected to constituent businesses on a personal level, money poured into a candidate's war chest, even in limited amounts, may well be viewed as a *quid pro quo* when

the sum of these contributions greatly outweighs other candidates' funds because it appears that self-interested donors have helped "buy" an election outcome. This corruption or perceived corruption lessens the confidence of citizens in their state government. The legislature of Vermont enacted campaign expenditure limits specifically to combat this possibility, and for the other reasons noted above. *Cf. Nixon*, 528 U.S. at 394.

The opportunity for corruption has special significance at the state level for other reasons as well. For example, the political weight of a dollar in a state election may be greater than the weight of the same dollar in a federal election. *Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 649 (6th Cir. 1997), *cert. denied*, 522 U.S. 860 (1997). The more money that appears in these smaller, state electoral systems, the greater the potential for the appearance of corruption. Moreover, states may well be less able to devote scarce time and sparse resources to investigating and combating corrupt fundraising practices.[13]

If a dollar weighs more in state elections, the need for more dollars diminishes. In state elections, a smaller geographic area or smaller number of constituents allows candidates to communicate through less expensive media than candidates for federal office. In the case of Vermont legislative candidates, an effective campaign need not undertake or finance large-scale media campaigns across multiple markets to communicate with voters. Rather, the Vermont legislature found door-to-door communications were preferred and expected among Vermont voters. *Landell*, 382 F.3d at 130-31. Because the cost of running a

---

[13] *See* Nancy Northrup, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 Colum. L. Rev. 1677, 1681 (1987); Peter Henning, *Public Corruption: A Comparative Analysis of International Corruption Conventions and United States Law*, 18 Ariz. J. Int'l. & Comp. L. 793 (2001).

state election is often far less than a federal campaign, and because a state is best able to determine reasonable expenditure limits based on its unique geography and population, expenditure limits at a state level are unlikely to "drive the sound of a candidate's voice below the level of notice" and thus infringe on the candidate's First Amendment right of free speech. *Cf. Nixon*, 528 U.S. at 397. This plain difference in scale compels a different balancing of interests when analyzing expenditure limitations in a state election than the Court applied when analyzing the federal expenditure limits at issue in *Buckley*.

IV. STATE GOVERNMENTS NEED EVEN GREATER FLEXIBILITY THAN THE DECISION BELOW ALLOWS TO SOLVE THE PROBLEMS ASSOCIATED WITH FINANCING OF STATE ELECTIONS.

Citizens have the greatest interest and the most intimate familiarity with the particular concerns of their states:

> The first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. . . . By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these the people will be more familiar[]. . . .

The Federalist, No. 46, at 294-295 (James Madison) (Clinton Rossiter ed., 1961). As in those early days, citizens and their local leaders are still most familiar with the issues and problems that plague their local electoral systems. Their efforts to formulate appropriate measures to secure their

chosen form of government are, therefore, entitled to deference.[14]

Our system of federalism encourages states to experiment in their electoral systems to provide novel solutions to the problems associated with campaign financing. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).[15] But the rigid application of *Buckley* by courts other than the Second Circuit has handcuffed states that wish to address the problems that plague their local systems—systems that the voters and local legislators understand far better than the federal courts. In order for local governments to protect and maintain truly representative democracies that are free from corruption, states must be allowed to serve as the testing grounds for new forms of campaign finance reform.

From the very founding of our nation, States have in fact served as laboratories for innovations in government. The

---

[14] *See Landell*, 382 F.3d at 97 n.1 ("we respect the Vermont Legislature's similar reliance – in enacting regulations on both campaign contributions and expenditures – on its substantial historical experience with campaign finance reform and its informed predictions about Vermont candidate and donor behavior."); *id.* at 112-13 ("Some degree of deference on the issue of whether there are state interests that justify legislative changes to the State's electoral system may also be appropriate.").

[15] *See also* Stephen Breyer, *Our Democratic Constitution*, Madison Lecture, 77 N.Y.U. L. Rev. 245, 257 (May 2002) ("By guaranteeing state and local governments broad decisionmaking authority, federalist principles facilitate 'novel social and economic experiments,' secure decisions that rest on knowledge of local circumstances, and help to develop a sense of shared purposes among local citizens.").

federal constitution was modeled after the constitutions of the individual states, and federal initiatives have often been derived from state innovations such as the extension of the vote to African Americans, women, and eighteen-year-olds; the abolition of slavery; the direct election of U.S. Senators; workers' compensation legislation; minimum wage laws; and many significant environmental regulations. *See* Frederick Schwarz, *From the Ground Up: Local Lessons From National Reform*, 27 Fordham Urb. L.J. 5, 16-19 (1999). Even after enactment of the Bipartisan Campaign Reform Act – an extraordinary effort at comprehensive reform – the flow of large contributions to support candidates haunts elections at all levels of government across the country. *See* Grimaldi & Edsall, *Super Rich Step Into Political Vacuum*, W h. Post, Oct. 17, 2004, at A01; *see also McConnell*, 540 U.S. at 224 (explaining that "Money, like water, will always find an outlet," therefore, limiting the use of money is necessary for true reform). The job of reforming the broken system of campaign financing remains unfinished at the national level, and can best be achieved by allowing for innovation in local and state election systems.

This petition presents the Court with an opportunity at a critical time to recalibrate the balance of constitutional interests bearing on campaign expenditure limits in the state and local context. Many states apparently have taken *Buckley* to prohibit expenditure reforms outright.[16] Further,

---

[16] The National Conference of State Legislatures, for example, cautions that "the court has ruled that spending limits are constitutional only if they are optional." *Campaign Finance at* http://www.ncsl.org/programs/legman/about/campfin.htm. Vermont's experience is illustrative. Vermont implemented mandatory expenditure limits for primaries in 1961 and general elections in 1971, but repealed those limits in the wake of *Buckley*. 1961 Vt. Laws 178; 1971 Vt. Laws 259; 1975 Vt. Laws (Adj. Sess.) 188. In 1993, Vermont attempted to institute a system of voluntary expenditure limits; but discontinued those efforts when

the Tenth Circuit just last year struck down the only other remaining local expenditure limits of which *amici* are aware–relying on *Buckley* to justify what amounted to a categorical prohibition on expenditure limits.[17] Thus, the limits at issue are the only surviving state-level expenditure limits known to these *amici*, who are active participants in campaign finance legislative efforts around the country.

The Court should take this case to clarify the application of *Buckley* in the state and local contexts, and to correct the assumption, made by many other courts, state legislatures, and local governments, that the First Amendment categorically forbids any limits on the high level of campaign spending in state and local races. With the benefit of almost 30 years of experience since *Buckley*, this case presents an opportunity for the Court to calibrate the important differences in the balance of constitutional considerations affecting state and local elections and to account for the appropriate role of federalism and the value of local electoral participation in the scrutiny of state governments' innovations in the pursuit of democracy.[18]

CONCLUSION

For the foregoing reasons, the Court should grant the petitions as to question one and the conditional cross-petition for a writ of *certiorari*.

---

they proved unworkable in practice. *See* Former Vt. Stat. Ann. tit. 17, §§ 2841-42 (1991) (repealed 1997); *Landell*, 382 F.3d at 132.

[17] *See Homans*, 366 F.3d at 914-21.

[18] As Justice Kennedy has stated, "I would leave open the possibility that Congress, or a state legislature, might devise a system in which there are some limits on both expenditures and contributions, thus permitting officeholders to concentrate their time and efforts on official duties rather than on fundraising." *Nixon*, 528 U.S. at 409 (Kennedy, J., dissenting).

Respectfully submitted,

MARTHA TIERNEY
KELLY, HAGLUND, GARNSEY & KAHN L.L.C.
1441 Eighteenth Street,
Suite 300
Denver, Colorado 80202 -1255
(303) 296-9412
Counsel for Amicus Curiae Common Cause

DOUGLAS R.M. NAZARIAN*
PATRICIA A. BRANNAN
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for other Amici Curiae

* Counsel of Record